MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1618

WILLIAM DAVENPORT,

Petitioner,

vs.

BENJAMIN ALTMAN, DANIEL W. JOY, HARRY MICHELSON, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Grattan v. *Societa Per Azzioni Cotonifico Cantoni,* 151 F. Supp. 813, 817 (S.D.N.Y., 1957) affirmed 251 F.2d 343 (Second Circuit, 1958) .....

I.L.F.Y. Co. v. *Temporary State Housing Rent Commission,* 10 N.Y. 2d 263, 219 N.Y.S. 2d 249 (1961), app. dism. 369 U.S. 795 (1962) .....

Lincoln Bldg. v. *Barr,* 1 N.Y. 2d 413, 153 N.Y.S. 2d 633 (1956), app. dism. 355 U.S. 12 (1957) .....

Marcus Brown Co. v. *Feldman,* 256 U.S. 170 (1921) ..

People ex rel. Durham R. Corp. v. *La Fetra,* 230 N.Y. 429 (1921), app. dism. 257 U.S. 665 (1921) .....

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STATUTES CITED

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Statement

Petitioner's motion for a writ of certiorari seeks review of an order of the United States Court of Appeals for the Second Circuit, dated March 5, 1974 (Appendix 1). That order, without opinion, affirmed a judgment of the United States District Court for the Southern District of New York (Gurfein, J.) which had dismissed the complaint.

Question Presented

Are any substantial federal questions raised by a Court of Appeals affirmance of a judgment by the District Court, dismissing an action challenging a City government admin-

istrative rent control determination which had bee affirmed in the State courts and thereafter, unsuccessfull challenged in four prior actions in the Federal courts!

Facts

Pursuant to the previously applicable State Rent Co trol Law (McKinney's Unconsolidated Laws, Section 858 Paragraph 2(h)) and the present New York City Re Control Law (New York City Administrative Code, Se tion Y51-3.0, paragraph e(2)(i)(3)), an apartment i exempted from rent control if the owner had occupied i for at least one year previously.

This petitioner filed for decontrol of five apartments i an eight apartment building owned by him at 575 Ea 168th Street, Bronx, New York, on the basis that he ha occupied each of the five apartments. After contrary fin ings of fact were made, the City Rent Administration d termined that he was not entitled to decontrol as to fou of the apartments. He then took an administrative appe which also rejected his contentions after de novo revie

A judicial review proceeding, brought by the petitione landlord in the Supreme Court, New York County, on th ground of denial of due process, resulted in a decision, i 1966, sustaining the administrative determination. Thi was subsequently affirmed, in 1967, by the Appellate D vision of the New York State Supreme Court, First D partment, in *Matter of Davenport* v. *Berman,* 27 A.D. 2 903, 280 N.Y.S. 2d 534, and no further appeal was take

The same claim was raised by Mr. Davenport in a ne action, brought in the United States District Court for th Southern District of New York. The complaint of lack d due process was dismissed by Judge Cannella in Jul 1969. *Davenport* v. *Berman,* (S.D.N.Y., 68 Civ. 4984) an affirmed on appeal to the Court of Appeals for the Secon Circuit on December 29, 1969 (420 F. 2d 294).

The petitioner then brought another action, which concerned the same constitutional matters, in *Davenport* v. *City Rent and Rehabilitation Administration* (S.D.N.Y., 70 Civ. 1011) in which Judge Tenney dismissed the complaint on the ground of *res judicata*. Again, the petitioner appealed to the Court of Appeals which dismissed his appeal, on motion by City Rent, on September 24, 1970.

This Court denied the petitioner's writ of certiorari, from the dismissal of the last mentioned appeal, in *Davenport* v. *City Rent and Rehabilitation*, 401 U.S. 956, and denied rehearing at 402 U. S. 934.

Mr. Davenport returned to the District Court and commenced another action in which Judge Cannella again dismissed the complaint, on October 19, 1971, in *Davenport* v. *Rockefeller* (S.D.N.Y., 71 Civ. 1747), and yet another, *Davenport* v. *Lindsay* (S.D.N.Y., 71 Civ. 2205), concerning the same subject matter and with the same end, dismissal of the complaint, the last by Judge Gurfein, on May 12, 1972. The latter dismissal was affirmed by the United States Court of Appeals, on January 5, 1973, without opinion.

Mr. Davenport, had also gone back to the New York State Courts and, on essentially the same grounds, moved in the Supreme Court, New York County, to reopen the original judgment. The motion was denied, by Mr. Justice Quinn, in a decision published only in the New York Law Journal (June 25, 1971, p. 13, c. 2). An appeal from that decision was never perfected by the petitioner. Instead, he made a subsequent motion to vacate the original 1966 judgment based upon claims of new evidence, fraud and misrepresentation and lack of jurisdiction by the Supreme Court. This last motion resulted in a decision by the Supreme Court, New York County, Mr. Justice Herbert B. Evans, dismissing the motion as an attempted collateral attack on the prior judgment (unpublished except in New York Law Journal, June 22, 1973, p. 2, c. 4). There-

after, the petitioner appealed to the Appellate Division, again on the basis that he had been denied due process and this appeal was also dismissed. *Davenport* v. *Berman*, 43 A.D.2d 647, 350 N.Y.S. 2d 337.

The fifth federal action brought in the District Court by Mr. Davenport was instituted in 1971 (71 Civ. 4263), and again claimed deprivation of statutory and constitutional rights. The complaint was dismissed by Judge Gurfein on July 31, 1973. The United States Court of Appeals dismissed an earlier appeal from orders of the District Court, on March 27, 1973, for lack of appellate jurisdiction. Then, on March 4, 1974, the Court of Appeals affirmed the judgment of July 31, 1973. It is this last case which is involved in this application for a writ of certiorari.

ARGUMENT

The judgment below was properly affirmed because the issue of constitutionality was determined to be *res judicata* in all the prior litigation.

Patently, the petitioner's continuing attempt to relitigate the same issue time and time again, amounting to some 23 actions, appeals, and motions initiated by him in the Federal Courts and the New York Courts, in an effort to overturn what was, in fact, a routine administrative determination, is properly barred by the doctrine of *res judicata*. *Angel* v. *Bullington*, 330 U.S. 183, 192 (1946); *Brownell* v. *Chase National Bank of the City of New York*, 352 U.S. 36 (1956); *Grattan* v. *Societa Per Azzioni Cotonifico Cantoni*, 151 F. Supp. 813, 817 (S.D.N.Y., 1957) affirmed 251 F.2d 343 (Second Circuit, 1958).

Upon attacks on many different grounds over the years, this Court has sustained the constitutionality of every challenged aspect of rent control:

Block v. *Hirsch*, 256 U.S. 135 (1921);

Marcus Brown Co v. *Feldman*, 256 U.S. 170 (1921);
People ex rel. Durham R. Corp. v. *La Fetra*, 230 N.Y. 429 (1921), app. dism. 257 U.S. 665 (1921);
Bowles v. *Willingham*, 321 U.S. 503 (1944);
Twentieth Century Associates v. *Waldman*, 294 N.Y. 571 (1945), app. dism. 326 U.S. 697 (1946);
Woods v. *Miller Co.*, 333 U.S. 138 (1948);
Lincoln Bldg. v. *Barr*, 1 N.Y. 2d 413, 153 N.Y.S. 2d 633 (1956), app. dism. 355 U.S. 12 (1957);
Four Maple Drive Realty Corp. v. *Abrams*, 2 A.D. 2d 753, 153 N.Y.S. 2d 747 (1956), affd. 2 N.Y. 2d 837, 159 N.Y.S. 2d 976 (1957), app. dism. 355 U.S 14 (1957);
I.L.F.Y. Co. v. *Temporary State Housing Rent Commission*, 10 N.Y. 2d 263, 219 N.Y.S. 2d 249 (1961), app. dism. 369 U.S. 795 (1962);
8200 Realty Corp. v. *Lindsay*, 27 N.Y. 2d 124, 313 N.Y.S. 2d 733, app. dism. 400 U.S. 962, 91 Sup. Ct. 367 (1970).

No substantial issues, legal or factual, were presented below in this litigation.

CONCLUSION

The petition for certiorari should be denied.

Dated May 22, 1974.

Respectfully submitted,

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ZEBBIA FRIEDMAN
Of Counsel

APPENDIX 1

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of March one thousand nine hundred and seventy-four.

Present: HON. IRVING R. KAUFMAN,
Chief Judge.

HON. WILFRED FEINBERG
HON. WILLIAM H. MULLIGAN
Circuit Judges.

William J. Davenport
Plaintiff-Appellant

v.

Benjamin Altman, Commissioner of the N.Y.C. Rent Control Agency, Daniel W. Joy and Harry Michelson, General Counsel of the N.Y.C. Rent Control Agency, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel for appellee and by appellant pro se.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Irving R. Kaufman
Wilfred Feinberg
William H. Mulligan